6-16-2008

Justad v. Ward Respondent's Brief 2 Dckt. 34793

IN THE SUPREME COURT OF THE STATE OF IDAHO

WILMA CLAIRE JUSTAD,

Plaintiff / Respondent / Cross-Appellant

v.

RONALD WARD, Personal Representative of the Phyllis A. Gasser Estate,

Defendant / Appellant / Cross-Respondent

Supreme Court Docket No. 34793

RESPONDENT'S / CROSS-APPELLANT'S BRIEF

Cross-Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai

The Honorable John T. Mitchell, District Judge, Presiding

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Respondent / Cross-Appellant Wilma Claire Justad (hereinafter "Justad"), submits this Reply Brief in response to the arguments set forth by Appellant / Cross-Respondent Ronald Ward (hereinafter "Ward"), in his Appellant / Cross-Respondent's Reply Brief ("Ward's Reply Brief") filed in this matter. For the reasons set forth below, Ward does not present any compelling or justifiable reason for this Court to grant Ward the relief he seeks on appeal.

I. STATEMENT OF THE CASE

Justad realleges and incorporates herein the Statement of the Case, Course of Proceedings, and Statement of Facts set forth in her opening brief. (Justad's Respondent's / Cross Appellant's Brief, pp.1–6).

II. ARGUMENT

A. Standard of review.

In her opening brief, Justad set forth the standard of review arising in an appeal to this Court from a district court's decision to specifically enforce an option contract. (Justad's Respondent's / Cross Appellant's Brief, pp.6–7). Briefly stated, the decision to grant specific performance is a matter within the sound discretion of the district court. *Kessler v. Tortoise Development, Inc.*, 134 Idaho 264, 270, 1 P.3d 292, 298 (2000). As such, a district court's decision to grant or deny parties' request for specific performance will not be overturned on appeal short of a showing that the district court abused its discretion. *Id.* An abuse of discretion review requires a three-part inquiry: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *Foster v. Traul*, 145 Idaho 24, 28, 175 P.3d 186, 190 (2007). The burden is on the appealing party to establish that the district court abused its

discretion. *See Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 857, 920 P.2d 67, 73 (1996) ("holding, [t]he burden is on the party opposing the award to demonstrate an abuse of the district court's discretion").

As was shown in Justad's opening brief, Ward has failed to carry the above-mentioned burden on this appeal. Ward has not set forth any argument that the district court failed to perceive the issue of whether to grant or deny specific performance in this case as one of discretion. Furthermore, Ward has failed to establish that the court acted outside the boundaries of its discretion, or that it failed to reach its decision by an exercise of reason. As a result, the district court's decision to specifically enforce the option contract should be affirmed on appeal.

B. The district court did not abuse its discretion by holding that the option contract contained sufficiently complete material terms so as to be valid and specifically enforceable.

In its bench ruling, the district court held that the option contract was sufficiently complete, definite, and certain in all its material terms to be enforceable through a decree of specific performance. (Tr., p.111, ll.18–19). As in his Appellant's Brief, Ward continues to argue in his Reply Brief that option agreement is unenforceable because it lacks certain essential terms. (Ward's Reply Brief, pp.2–4). Specifically, Ward argues that option contract at issue here is insufficient with respect to the following two terms: (1) manner of payment, and (2) method of conveying title to the real property. (Ward's Reply Brief, pp.2–4). Ward's arguments in these respects are unavailing, and each will be addressed in turn.

1. The option contract is sufficiently definite with regard to the manner of payment term so as to be valid and specifically enforceable.

In *Dante v. Golas*, 121 Idaho 149, 152, 823 P.2d 183, 186 (Ct. App. 1993), the Idaho Court of Appeals held that for an option to be specifically enforceable, it must "be certain as to price, manner of payment, and description of the property." Other jurisdictions have similarly held that to be enforceable, an option contract must contain the following: (1) an agreement conferring a right to buy; (2) certain described property; (3) a fixed period of time; and (4) a stated price. 77 Am. Jur. 2d Vendor and Purchaser § 28 (2006); *see e.g., Tachdjian v. Phillips*, 568 S.E.2d 64, 66 (Ga. App. 2002). In this case, as set forth in more detail in Justad's opening briefing, the option contract at issue contained all the terms required under Idaho law to be valid specifically enforceable. (Justad's Respondent's / Cross Appellant's Brief, pp.9–13).

Nonetheless, Ward argues that the option contract lacks a manner of payment term, and should be unenforceable as a result. (Ward's Reply Brief, pp.2–3). In support of his argument, Ward simply argues that district court's holding that the first $9,700 payment was to be due on the date of exercise – April 11, 2006 – to be followed by equal annual payments until the purchase price was paid off, "converted the parties' ten-year contract to a nine-year contract." (Ward's Reply Brief, pp.2–3). Simply stated, Ward's argument in this respect lacks merit.

This Court has held, that with respect to the specific performance of real estate contracts, specific performance will not be granted unless the contract is "complete, definite and certain in all of its material terms, or contains provisions which are capable in themselves of being reduced to certainty." *Locklear v. Tucker*, 69 Idaho 84, 90, 203 P.2d 380, 383–84 (1949). However, this Court does hold the contracting parties to a standard of absolute certainty relative to every detail of an option contract, and "uncertainty in a subsidiary part of an [option] agreement whose main particulars are sufficiently certain, *will not* prevent a decree of specific performance." *Id.* (emphasis added).

In this case, the manner of payment term provided for in the option contract is certain, and in the alternative, is easily capable of being reduced to certainty. The option contract in this case expressly stated the manner of payment, providing that the purchase price of $97,000 "shall be payable in equal annual installments from the date of exercise of said Option over a ten (10) year period of time, without interest upon the unpaid balance." (Plaintiff's Ex. 3); (R., p.114). The plain language of the option contract, if not certain, can be reduced to certainty. The district court easily reduced the manner of payment term to certainty in its bench holding:

> I am finding . . . that the option was exercised as of April 11, 2006. The first annual payment was due at that time, and that's consistent with what [Justad] testified her expectation of the first payment being due, and that was when the option was exercised, so the contract tells us that the first payment's due when the option's exercised.
>
> I find as a matter of fact and law that $9,700 was due on April 11th, 2006, another $9,700 was due April 11th, 2007, and another $9,700 is due April 11th 2008 and so on. Now, those payments have not been made, and the reason they've not been made is this litigation and essentially Ron Ward's refusal to recognize [Justad's] acceptance of the option.

The district court found, and that option contract clearly contemplated, that the purchase price of $97,000 would be paid in ten (10) installment payments, to be made annually, the first of which was due "on the date of exercise." There is nothing so uncertain with respect to this term to cause the option contract to be unenforceable.

In even more extreme situations, where the price of purchase and the terms of payment of an option contract are not specified in the contract itself, option contracts have been specifically enforced where the price and manner of payment could otherwise be reduced to certainty. *See e.g., Dante*, 121 Idaho at 152, 823 P.2d at 186 (in affirming the enforceability of a lease-option, the court held "the price of the purchase and terms of payment, though not specified, could easily have been reduced to certainty"). Thus, Ward's argument that the option contract should be

unenforceable and invalid because it is insufficient with respect to the manner of payment term is unavailing.

2. The option contract contained all the terms required to be valid and enforceable.

In addition, Ward argues in his Reply Brief that the option contract should be found unenforceable because it does not specify "the method of conveying title to the real property." (Ward's Reply Brief, pp.3–4). Ward's premise is erroneous as a matter of law. As an initial matter, Ward does not cite to any case law or authority from any jurisdiction wherein it has been held that the method of conveying title to the real property is one of the essential terms necessary to the specific enforcement of an option contract, the lack of which would render an otherwise valid option contract unenforceable.

To the contrary, it has been held in Idaho that for an option to be specifically enforceable, it must "be certain as to price, manner of payment, and description of the property." *Dante*, 121 Idaho at 152, 823 P.2d at 186. The option contract at issue here, as established in detail in Justad's opening briefing, contained all the terms required under Idaho law to be valid and enforceable. (Justad's Respondent's / Cross Appellant's Brief, pp.9–13). Similarly, as stated above, other jurisdictions have stated that an option contract will be enforceable if it contains the following terms: (1) an agreement conferring a right to buy; (2) certain described property; (3) a fixed period of time: and (4) a stated price. 77 Am. Jur. 2d Vendor and Purchaser § 28 (2006); *see e.g., Tachdjian v. Phillips*, 568 S.E.2d 64, 66 (Ga. App. 2002). Ward has not cited any authority that requires "the method of conveying title to the real property" as a precondition to the specific enforcement of an option contract.

Rather, in support of his argument, Ward relies upon this Court's opinion in *Hoffman v. S V Co., Inc.*, 102 Idaho 187, 628 P.2d 218 (1981), a case which is not on point with the facts of this case, and which does not involve an option contract or the specific enforcement of an option contract. In *Hoffman*, the plaintiff/appellant brought an action seeking specific performance or damages based upon the defendant/respondent's refusal to convey real property pursuant to an alleged oral contract. 102 Idaho at 188, 628 P.2d at 219. The issue in that case was whether sufficient memoranda existed evidencing the alleged oral agreement to adequately comply with the statute of frauds. *Id.* at 190, 628 P.2d at 221. The court held there was not, stating in relevant part:

> The letter does not sufficiently set forth the credit terms of the oral agreement between the parties. This does not mean that the oral agreement is incomplete, *but only that the written evidence of that agreement is insufficient to satisfy the statute of frauds.* The memorandum which evidences the verbal agreement must contain all the terms of that agreement. Otherwise, it cannot be enforced at law or in equity

Id. at 191, 628 P.2d at 222 (emphasis added). Of significance, the Court expressly held that the lack of credit terms did not mean that the parties' oral agreement was incomplete, but only that it failed to satisfy the statute of frauds. *Id.* In this case, the statute of frauds is not at issue, and thus, Ward's reliance on *Hoffman* is misplaced.

C. Idaho law recognizes that in every contract there exists not only express terms, but also those implied terms which are necessary to effectuate the intent of the parties.

In his Reply Brief, Ward sets forth argument that the district court abused its discretion by implying a contract for deed transaction with respect to the option contract. (Ward's Reply Brief, pp.4–5). With respect to the finding of implied terms in a contract, this Court made clear

that there exist both express and implied terms in a contract, and that implied terms are as much a part of the contract as express terms:

> In every contract there exist not only the express promises set forth in the contract but *all such implied provisions as are necessary to effectuate the intention of the parties,* and as arise from the specific circumstances under which the contract was made. In implying terms to a contract that is silent on the particular matter in question, only reasonable terms should be implied. Such implied terms are as much a part of the contract as those which are express.

Star Phoenix Min. Co. v. Hecla Min. Co., 130 Idaho 223, 231, 939 P.2d 542, 550 (1997) (emphasis added), (quoting, *Davis v. Professional Business Services, Inc.*, 109 Idaho 810, 813–14, 712 P.2d 511, 514–15 (1985)). This Court has further stated that "terms are to be implied in a contract . . . because they are necessarily involved in the contractual relationship so that the parties must have intended them." *Id.* (quoting, *Archer v. Mountain Fuel Supply Co.*, 102 Idaho 852, 642 P.2d 943 (1982)). Likewise, it is generally held that "[w]here a contract fails to specify all the duties and obligations intended to be assumed, the law will imply an agreement to do those things that according to reason and justice the parties should do in order to carry out *the purpose for which the contract was made.* 17A Am. Jur. 2d Contracts § 368 (emphasis added).

In this case, the district court did nothing more than find that the option contract contained certain implied terms "as [were] necessary to effectuate the intention of the parties," and "carry out the purpose for which the contract was made," consistent with Idaho law. *Star Phoenix Min. Co.*, 130 Idaho at 231, 939 P.2d at 550; 17A Am. Jur. 2d Contracts § 368. The express language of the option contract, as well as the evidence presented at trial, clearly established that it was the parties' intent that Justad have the option to purchase the lake front property described in the option following the death of the Gassers/Optionors. (Plaintiff's Ex. 3).

By implying a term for a contract for deed transaction, the district court (1) took into account the fact that the contract for sale, wherein the Gassers agreed to sell and the Justads agreed to purchase approximately 113 acres of property adjoining the option property, was a contract for deed transaction, and (2) carried out the purpose for which the option contract was made (i.e., to give Justad the chance to purchase the option property following the death of the Gassers). (Tr., p.125, ll.11–24). In finding that the option contract contained certain implied terms, the district court did not err so as to make the contract unenforceable, but rather merely implied such provisions and terms as were reasonably necessary to effectuate the intention of the parties consistent with Idaho law.

D. The district court's finding that Ward received notice of Justad's intent to exercise the option on April 11, 2006, is supported by substantial and competent evidence in the record.

In its bench ruling, the district court found as a matter of fact that Justad timely exercised the option on April 11, 2006, fifty-one (51) days after Decedent's death. (Tr., p.112, ll.1–3); (Tr., p.115, ll.16–17). In his Reply Brief, Ward argues that the district court's finding that the option was exercised on April 11, 2006 was not supported by the evidence. (Ward's Reply Brief, p.6). Specifically, Ward argues that (1) the intent to exercise an option is not sufficient to exercise an option, and (2) that constructive notice is insufficient to exercise an option. Each will be addressed in turn.

1. Justad argues, and the district court found, that she exercised the option on April 11, 2006.

In his Reply Brief, Ward confuses the issue by asserting that Justad argues that she "intended to exercise the option" at the April 11, 2006 hearing, and implies that Justad does not

argue that she actually exercised the option on April 11. (Ward's Reply Brief, pp.6). This is simply not the case and runs directly contrary to the arguments set forth by Justad throughout the duration of this matter as well as the district court's holding below. (Justad's Respondent's / Cross-Appellant's Brief, p.16 & p.20). More importantly, the district court expressly found that Justad timely exercised the option on April 11, 2006, fifty-one (51) days after Decedent's death. (Tr., p.112, ll.1–3); (Tr., p.115, ll.16–17); (R. p.131). The district court's express finding is of significance because this Court has held that "[a] trial court's findings of fact in a court tried case will be liberally construed on appeal in favor of the judgment entered, in view of the trial court's role as trier of fact." *Benniger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006). A trial court's findings of fact will only be set aside if they are clearly erroneous. I.R.C.P. 52(a); *Lovitt v. Robideaux*, 139 Idaho 322, 325, 78 P.3d 389, 392 (2003). Thus, it is clear that Ward's assertion that Justad argues that she intended to exercise the option at the April 11, 2006 hearing is clearly erroneous.

Based upon his erroneous assumption, Ward goes on to argue that district court's decision to specifically enforce the option contract at issue here should be overturned because Justad did not give notice of her exercise on April 11, 2006. In support of his argument, Ward cites to a single case from the State of Wyoming, *Shellhart v. Axford*, 485 P.2d 1031 (Wyo. 1971), and relies upon a portion of a single sentence from that case without setting forth the facts on which that case was decided. (Ward's Reply Brief, p.7). A review of *Shellhart* reveals that it is not on point with the facts of this case, and is easily distinguishable. As a result, it does not provide persuasive authority in this case.

In *Shellhart*, an optionee entered into an agreement to acquire an option to purchase certain real property from the optionor. 485 P.2d at 1032. An express term of the option

contract in that case was that the optionee was required to give the optionor "at least 30 days notice in writing of [optionee's] intention to so exercise said option." *Id.* The optionee subsequently wrote a letter to the optionor, which stated: "This letter shall constitute that notice, however, the actual exercise of the option will not occur until sometime before December 1, 1969." *Id.* at 1032–33 (emphasis added). The optionee did not thereafter exercise the option. *Id.* at 1033. When the optionee brought suit to specifically enforce the option contract based upon the above-mentioned letter, the Wyoming court denied the optionee's request, stating:

> The letter from plaintiff's attorney . . . referred to the option provision and stated: 'This letter shall constitute that notice, however, the actual exercise of the option will not occur until sometime before December 1, 1969.'
> . . .
> The words quoted make it clear the option was not currently exercised because it was stated the 'actual exercise of the option will not occur until sometime before December 1, 1969.'

Id. at 1032–33. The court stated that the above-mentioned attempt to give notice was not the same as giving notice. *Id.* at 1032.

This case is clearly distinguishable from *Shellhart*. In *Shellhart*, the terms of the option contract at issue specifically required the optionee to give the optionor thirty (30) days notice of his intention to exercise the option. Furthermore, in *Shellhart* the optionee gave the optionor notice that he planned to exercise the option in the future, but expressly made clear that he was not presently exercising the option. *Id.* at 1032–33. The optionee failed thereafter to subsequently exercise the option as he stated he would, and thus the Wyoming court found that optionee's act of informing the optioner that he was going to exercise the option in the future, and thereafter failing to do so, did not result in an exercise of the option. Such is not the case here. Justad gave notice of her exercise of the option to Ward on April 11, 2006. The district court expressly found that Justad exercised the option on April 11, 2006. (Tr., p.112, ll.1–3);

(Tr., p.115, ll.16–17); (R. p.131). This case does not involve a situation, such as that in *Shellhart*, where the optionee stated that he was going to exercise the option in the future, and then failed to follow up and exercise the option. As a result, Ward's reliance on the Wyoming case is misplaced.

2. Ward received notice of Justad's exercise of the option on April 11, 2006.

In his Reply Brief, Ward argues that Constructive Notice of Justad's exercise of the option at the April 11, 2006 hearing is insufficient. (Ward's Reply Brief, p.7). Ward's argument to this effect is unsupported by any citation to legal authority or case law. This Court has made clear that "issues not supported by legal argument or authority will not be considered by this Court" on appeal. *Vanderford Co., Inc. v. Knudson*, 144 Idaho 547, 555, 165 P.3d 261, 269 (2007). Thus, Ward's unsupported argument on the constructive notice issue should not be addressed by the Court.

Even assuming Ward's argument on this issue is addressed, it is unavailing. It is generally held that where there is an absence of any provision in the option contract referring the manner by which an option can be exercised, anything that amounts to a manifestation of the optionee's determination to accept is sufficient. *See e.g.*, *Killam v. Tenney*, 366 P.2d 739, 747 (Or. 1961) (holding that where nothing limits the way in which notice is to be exercised, "anything that amounts to a manifestation of the optionee's determination to accept is sufficient"); *Duprey v. Donahoe*, 323 P.2d 903, 905 (Wash. 1958) (holding that in the absence of any provision in the option with reference to the manner by which an option can be exercised, any manifestation indicating an acceptance is sufficient); *Steele v. Northrup*, 143 N.W.2d 302, 306 (Iowa 1966) (holding that "no particular form of notice is required in the absence of a

provision to the contrary in the instrument granting the option"). Though not controlling, this case law is certainly persuasive.

In this case, the terms of the option contract did not specify the manner in which the option was to be exercised following the death of the optionors. The terms of the Option provided the following with respect to the exercise of the Option:

> This Option may be exercised upon the mutual consent of all the parties to this Agreement, in writing, *or the JUSTED's [sic] may elect to exercise said Option upon the deaths of both JOHN W. GASSER and PHYLLIS A. GASSER.* Provided, that said election shall be exercised within sixty days of the death of the last to die, and said election shall be binding upon the Personal Representatives and Trustees and Estates of the GASSER'S. If the election is not exercised within said period of time, then this Option shall terminate, together with all rights hereunder.

(emphasis added). Thus, the contract was silent with respect to the manner in which notice of the exercise of the option should be given. As a result, anything that amounts to a manifestation of Justad's intent to exercise the option is sufficient. *See e.g., Killam*, 366 P.2d at 747 (holding that where nothing limits the way in which notice is to be exercised, "anything that amounts to a manifestation of the optionee's determination to accept is sufficient").

The district court correctly found that Ward received notice of Justad's exercise of the option as of April 11, 2006, given the facts presented in the record. Under this Court's holding in *Pfleuger v. Hopple,* 66 Idaho 152, 157, 156 P.3d 316, 318 (1945), a party has constructive notice of a fact when that party has actual knowledge of certain other facts from which it can be concluded that Defendant either did in fact know, or should have known, of the fact in question. Furthermore, under the Court's holding in *Fenton v. King Hill Irr. District,* 67 Idaho 456, 466, 186 P.2d 477, 482 (1947), a party is chargeable with notice of all the facts a reasonable

investigation would have disclosed where the facts and circumstances would excite the attention of a man of ordinary prudence.

In this case, Ward had notice of Plaintiff's intent to exercise the option as of April 11, 2006. It is undisputed that Ward was present at the April 11, 2006, hearing, that he knew and recognized Justad-Hood as Justad's daughter, that he knew Justad had an option to purchase the option property, and that he heard what said by Justad-Hood at the hearing. (Tr., p.84, ll.3–13); (Tr., p.83, ll.6–8). As a result of Ward's attendance at the April 11 hearing, Ward either did know or should have known that Justad intended to exercise the option given that that he knew and recognized Justad-Hood as Justad's daughter, knew Justad had an option to purchase the option property, and heard what said by Justad-Hood at the hearing. Given the evidence, the district court found that Ward received notice of Justad's intent to exercise the option on April 11, 2006:

> I . . . find that in fact Ron Ward knew who Jodie was. She was [Justad's] daughter. Knew that [Justad] had bought from and paid for an option years before from [Decedent] and her husband, knew that Jodie came bearing [Justad's] power of attorney, and that Jodie made that all clear to Ron Ward, the man who at the April 11th, 2006, hearing, was seeking to become the personal representative and the man who would later become the personal representative at the June 15th hearing. It was clear on April 11, 2006, that [Justad] was giving notice to Ron Ward, and I find as a matter of fact and law that there was no other interpretation that Ron Ward could've come away from that hearing with, so I find that the option was exercised, accepted on April 11, 2006.

(Tr., p.115, ll.4–17); *See also* (Supp. R., p.33). As set forth in more detail in Justad's opening brief, the district court's holding that Ward received notice of Justad's intent to exercise the option on April 11, 2006, is supported by substantial and competent evidence in the record, and thus should not be overruled on appeal. (Justad's Respondent's / Cross Appellant's Brief, pp.16–22).

E. Justad is entitled to attorney fees below and on appeal.

The argument set forth in this section supplements the argument already set forth by Justad in her opening brief pertaining to attorney fees below and on appeal. (Justad's Respondent's / Cross Appellant's Brief, pp.27–31). Justad is entitled to attorney fees below and on appeal pursuant to Idaho Code § 12-120(3). Idaho Code § 12-120(3), compels an award attorney fees to the prevailing party in any civil action to recover on a commercial transaction. Commercial transaction has been defined as "all transactions except transactions for personal or household purposes." I.C. § 12-120(3). The test for application of this statutory directive is whether the commercial transaction comprises the gravamen of the lawsuit, that is, whether the commercial transaction is integral to the claim and constitutes the basis upon which the party is attempting to recover. *Brower v. E.I. DuPont De Nemours and Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (1990).

Justad argued in her opening brief that she is entitled to attorney fees in this matter, both below and on appeal, because Justad's decision to enter into the option contract was made for investment purposes. (Justad's Respondent's / Cross Appellant's Brief, pp.27–29). The grounds on which said argument was made were based in this Court's holding in *Cannon v. Perry*, 144 Idaho 728, 732, 170 P.3d 393, 397 (2007), wherein this Court indicated that where a transaction involving a piece of real property is undertaken for "investment purposes," it may be a commercial transaction under Idaho Code § 12-120(3).

In this case, Justad testified she and her late husband entered into the 1978 contract of sale to purchase the 113 acres in Harrison,[1] and the 1978 option contract at issue here, for certain adjoining lake front property for investment purposes; namely, so that her son could develop it:

> Q. Tell me a little about that purchase. Why did you purchase property from the Gassers?
>
> A. Well, they had decided to get out of the cattle business and they didn't need that property, and, uh, so they were retirement age and so they said that, uh – we asked if we could have an option on the rest of the property, he was thinking about the upper property, hundred and thirteen acres I think it was, and, uh, so we said that, well, when, we – if we purchase it we'd like to have an option on the rest of it because we're gonna leave that part – all the property up here we were gonna leave to my son who since was killed, and – so that they could develop it, he could develop it when the time was right.

(Tr., p.23, ll.3–16). In *Cannon*, this Court looked to the intention of two appealing parties – Hinrichs and Moreno – at the time they entered into a written agreement for the purchase of certain real property to determine if they purchased the property for investment purposes. 144 Idaho at 732, 170 P.3d at 397. The two appealing parties argued that the transaction was made for residential purposes; however, this Court found that because the two appealing parties testified that they entered into the agreement to purchase for "investment purposes" the same was a commercial transaction under Idaho Code § 12-120(3). Because Justad's decision to enter into the option contract was made for investment purposes, she is entitled to attorney's fees pursuant to Idaho Code § 12-120(3).

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[1] On May 8, 1978, Justad and her husband R.W. Justad entered into two written agreements with Justad's sister Phyllis Gasser (hereinafter "Decedent") and her husband John Gasser.[1] (Justad Aff., R., p.75). The first was a contract of sale, wherein the Gassers agreed to sell and the Justads agreed to purchase approximately 113 acres of real property located in Harrison, Idaho, more particularly described in Plaintiff's Exhibit 2. (Justad Aff., R., p.75); (Tr., pp.23–26). The contract of sale is not at issue in this case. The second was an option contract, wherein the Justads acquired an option to purchase certain lake front property located in Harrison from the Gassers, more particularly described in Plaintiff's Exhibit 3. (Justad Aff., R., p.75); (Tr., pp.26–30).

III. CONCLUSION

Justad respectfully requests that this Court affirm the district court's decision to specifically enforce the option contract. In addition, Justad respectfully requests that this Court overrule the district court's decision to deny Justad's request for attorney's fees below. Last, Justad respectfully requests that this Court grant her request for attorney's fees and costs on appeal.

DATED this 10th day of June, 2008.

LUKINS & ANNIS, P.S.

By _____
PETER J. SMITH IV
ISB #6997
PAUL R. HARRINGTON
ISB #7482
Attorney for Respondent / Cross-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of June, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

William Appleton Attorney at Law 924 Sherman Ave Coeur d' Alene, ID 83814	☒ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX)

PETER J. SMITH IV
PAUL R. HARRINGTON